RECORD AND BRIEFS

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No. 16-111

IN THE

Supreme Court of the United States

MASTERPIECE CAKESHOP, LTD., ET AL.,
Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari to the Colorado Court of Appeals

BRIEF OF *AMICI CURIAE* 34 LEGAL SCHOLARS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses the question whether the First Amendment's longstanding prohibition on compelled expression "by word or act" prevents a State from imposing severe sanctions on a cake artist who, in accordance with his sincere convictions, declined to "design and create a cake to celebrate [respondents'] same-sex wedding."

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INTEREST OF *AMICI CURIAE*[1]

Amici are legal scholars who teach, research, and publish in the fields of antidiscrimination, freedom of religion, and freedom of expression, and who are committed to the achievement of a proper respect for each of these commitments. In this brief, *amici* specifically address the challenge of achieving such a proper and respectful balance. In pursuit of this goal, *amici* hope and attempt to offer a balanced perspective less available to parties immediately immersed in adversarial proceedings.

SUMMARY OF ARGUMENT

It is axiomatic that in the American constitutional system, "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). And yet in its central purpose and essence, this lawsuit seeks to do just that.

Petitioner Jack Phillips is a baker who, as the Court of Appeals explained, "believes that decorating cakes is a form of art [and] that he can honor God

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[1] Petitioners and the Respondent Colorado Civil Rights Commission have filed blanket consents with the Supreme Court; their consents are on file with the Clerk. Counsel for the individual Respondents Craig and Mullins granted consent to the filing of this brief; their consent accompanies this brief. *Amici* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

through his artistic talents." Respondents Charlie Craig and David Mullin approached Phillips and asked him to "design and create a cake to celebrate their same-sex wedding." *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272, 276-77 (Co. Ct. App. 2015). When Phillips declined on grounds of his religious belief (at the same time explaining that "he would be happy to make and sell them any other baked goods"), respondents easily obtained a cake with a rainbow design from another baker—and then filed discrimination charges.

This dispute is thus not about any deprivation of a needed product, service, or opportunity; indeed, no such damages were claimed or awarded. The case is rather about messages or *expression*—about the offense incurred because of Phillips unwillingness to use his artistic gifts to celebrate a wedding he believed to be contrary to God's law. And the remedy sought and awarded is calculated simply and solely to compel Phillips to celebrate such weddings in the future.

In short, this lawsuit is little more than an effort to force Phillips to use his artistic gifts to celebrate same-sex weddings, contrary to his convictions. Although framed in terms of "discrimination," this fundamental violation of the commitment articulated in *Barnette* cannot be justified by any compelling state interest in eradicating discrimination. That is because even if the interest advanced by historic antidiscrimination measures such as the Civil Rights Act of 1964—the interest, namely, in overcoming invidious, status-based discrimination—is deemed sufficiently compelling to override core First

Amendment commitments, no such interest is presented in this case. Jack Phillips is emphatically *not* the much feared merchant who refuses to serve people who are black, or female, or gay. He merely objects to using his artistic gifts to design and create cakes, no matter who might request them, that send messages contradicting his traditionalist Christian convictions. In other instances such messages have included or might include racist, antipatriotic, or atheistic messages; in this instance the message happens to be one celebrating same-sex marriage.

On these facts, a balanced commitment to both equality and expressive freedom, especially urgent at a time of national polarization, requires that the principle articulated in *Barnette* be honored, not sacrificed or rationalized away. Indeed, a contrary outcome would make a mockery of this Court's conciliatory declaration in *Obergefell v. Hodges*, 135 S. Ct 2584, 2602 (2015), that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."

ARGUMENT

I. In Both its Purpose and its Effect, the State's Effort to Compel Phillips to Use His Artistic Talents in a Manner Violative of His Sincere Convictions Offends the Vital Constitutional Commitment to Freedom of Expression.

A. The Longstanding Prohibition Against Compelling Expression "By Word or Act" is Core to Our Constitutional Tradition.

In one of the most revered statements ever uttered by this Court, Justice Robert Jackson wrote for the Court that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess *by word or act* their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). *Barnette*'s celebrated declaration is one among numerous testaments to the centrality in the American constitutional tradition of the freedom of expression—and, more specifically, to the understanding that this freedom includes not just the right to say what one believes but also, and as importantly, the right *not* to affirm, *"by word or act,"* ideas or opinions that one does *not* believe.

This commitment is not the product of any passing political fashion or enthusiasm. On the contrary: the commitment has developed against the backdrop of recurrent abuses and injustices

committed over the centuries—abuses and injustices to which governments are perennially prone but which the founders and guardians of American constitutionalism have been determined to avoid.

Thus, the book of Daniel in Hebrew scripture narrates the story of Hananiah, Mishael, and Azariah, (given the Babylonian names of Shadrach, Meshach, and Abednego), who were thrown into a fiery furnace for refusing to bow before a golden statue. In late antiquity, Christians were often required to burn incense to pagan idols or to pay obeisance to divinized emperors; this practice seemed perfectly innocuous to Roman authorities but was a sacrilege to Christians.[2] Later, under Christendom, Jews, Muslims, and unorthodox Christians were sometimes pressured or compelled to profess approved Christian doctrines with which they did not agree.[3] Still later, in England, affirmation of the prevailing creed became a condition for public office, or for the right to inherit or to attend Oxford or Cambridge.[4]

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[2] *See* Bruce W. Winter, *Divine Honours for the Caesars: The First Christians' Responses* (2015); 1 Edward Gibbon, *The Decline and Fall of the Roman Empire* 537-538 (David P. Womersley ed., Penguin Press 1994) (1776).

[3] *See* Brian Tierney, *Religious Rights: A Historical Perspective*, *in* RELIGIOUS LIBERTY IN WESTERN THOUGHT 29 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996); Norman F. Cantor, *The Civilization of the Middle Ages* 512-13 (rev. ed. 1993); Jane S. Gerber, *The Jews of Spain* 115-44 (1992).

[4] *See* Alexandra Walsham, *Charitable Hatred: Tolerance and Intolerance in England, 1500-1700* 86-87 (2006); Alec R. Vidler, *The Church in An Age of Revolution* 40-41 (1st ed. 1961).

The oppressiveness of such practices lay not so much in preventing people from expressing their beliefs; rather, it consisted of the even more invasive practice of *forcing people to affirm what they did not believe.* Thus, an early monument to freedom of expression and conscience in the Anglo-American tradition was the martyrdom of Sir Thomas More, formerly Lord Chancellor to King Henry VIII. (The events are engagingly presented in Thomas Bolt's *A Man for All Seasons.*) With regard to the fraught issue of Henry's annulment of his marriage to Catherine of Aragon and marriage to Anne Boleyn, More resolved to remain silent, declining to disclose his opinions even to his own family. Despite his steadfast silence on the matter, More was imprisoned, condemned, and beheaded because he would *not* affirm, contrary to his beliefs, the validity of the annulment and the succession.[5]

The American founders rebelled against the oppression inherent in such compulsion. It is "sinful and tyrannical," Thomas Jefferson insisted, opposing a tax for the support of Christian ministers, "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."[6] But if it is "sinful and tyrannical" to compel people indirectly to *subsidize* opinions they disbelieve, it is surely even more oppressive to compel them overtly to *affirm*—by "word or act," as *Barnette* declared—opinions they do not believe. And it is more oppressive still to conscript people not merely

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[5] *See* Richard Marius, *Thomas More* 461-514 (1984).

[6] 2 *The Papers of Thomas Jefferson, 1777–18 June 1779*, 545-553 (1950, Julian P. Boyd ed.)

passively to assent to what they disbelieve, but to *use their own artistic talents to create expressions celebrating* what they believe to be wrong.

Modern constitutional theorizing reinforces this historical precept against compelled expression. Theorists offer diverse rationales for the constitutional commitment to free expression; prominent among these are the ideas of a truth-seeking "marketplace of ideas," or of the communication of information as essential to democratic processes, or of the essential and intimate connection of expression to individual autonomy and integrity.[7] By any of these rationales, compelling a person explicitly or symbolically to affirm ideas that he or she does not believe is a flagrant offense against the commitment to expressive freedom. Forcing people to profess or celebrate what they do not believe distorts the marketplace of ideas and obstructs the pursuit of truth; it pollutes the flow of accurate information with forced and insincere affirmations; and it assaults the integrity and conscience of those who are forced to affirm what they do not believe. And such compulsion can engender alienation and politically-divisive pushback from those who have been so coerced.

This Court has accordingly recognized, repeatedly, the constitutional prohibition against

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[7] *See* Toni M. Massaro, *Tread On Me!*, 17 U. PA. J. Const. L. 365, 386 (2014) (observing that "[t]he most influential theoretical justifications [for freedom of expression] take three forms: arguments from democracy, or political-based theories; arguments from autonomy, or liberalism-based theories; and consequentialist arguments from knowledge or 'truth'").

compelled expression, whether "by word or act." The principle so stirringly expressed in *Barnette* has been reiterated in a variety of cases and contexts–including in cases in which a party objected to supporting an idea even though not being asked to personally and explicitly endorse that idea. *See*, e.g., *Pac. Gas and Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1 (1986) (plurality) (forbidding government from requiring a business to include a third party's expression in its billing envelope); *Wooley v. Maynard*, 430 U.S. 705 (1977) (forbidding government from requiring citizens to display state motto on license plates); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974) (forbidding government from requiring a newspaper to include an article).

The principle against compelled expression is especially vital because it protects the integrity of *all* citizens. In the present case, the principle is invoked in behalf of a traditionalist Christian who cannot in good conscience use his artistic talents to celebrate same-sex marriage. But in other cases the same principle would protect a gay florist who might object to helping with an event opposing same-sex marriage—or an African-American baker who refused to fill an order from the KKK for a cake saying "Black Lives Don't Matter,"[8] or a dress-maker who did not want to design a dress for the inauguration of a chief executive she opposed. Indeed, even in ruling against Phillips in this case, the Colorado Court of Appeals

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[8] *See* Ronald D. Rotunda, *Marriage Litigation in the Wake of Obergefell v. Hodges*, JUSTIA (Sept. 25, 2015), https://verdict.justia.com/2015/09/28/marriage-litigation-in-the-wake-of-obergefell-v-hodges.

wrote approvingly of the state's Civil Rights Division's finding in favor of bakeries that had refused to prepare cakes with messages indicating that homosexual conduct is sinful. These bakeries were justified in their refusal, the Court of Appeals reasoned, "because of the offensive nature of the requested message." *Masterpiece Cakeshop*, 370 P.3d at 282 n. 8.

Of course, prevailing political, religious, and moral opinions shift from time to time and place to place; so a person of integrity who is comfortably in harmony with prevailing opinion one year may find himself or herself in a disfavored or scorned minority the next year. It is precisely because it protects the integrity of all Americans against potential and shifting impositions from different directions that the commitment affirmed in *Barnette* is a "fixed star in our constitutional constellation."

B. Whether Considered from the State's or Phillips's Perspective, This Action Amounts to an Effort to Compel Phillips to Celebrate and Affirm the Acceptability of Same-Sex Marriage, in Violation of His Convictions.

In their classic form and purpose, antidiscrimination laws are not at odds with the commitment to freedom of expression. Historically, the purpose of antidiscrimination laws has not been primarily about messages or expression, but rather about ensuring that needed goods, services, and opportunities will not be denied to vulnerable or historically disfavored groups. As this Court

explained in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 252-53 (1964), for example, the protections of the federal Civil Rights Act of 1964 sought to eliminate widespread refusals of service that made it difficult or impossible for African-Americans to find food or lodging when traveling in various regions of the country. Similarly, laws or constitutional doctrines forbidding discrimination against women have sought to redress the denial of employment or other opportunities on the basis of sex. *See United States v. Virginia*, 518 U.S. 515, 531 (1996) (explaining importance of "skeptical scrutiny of official action denying rights or opportunities based on sex").

But this Court has refused to allow an unquestionably legitimate antidiscrimination law to be applied in a way that would seriously intrude on the freedom of expression. In *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995), a private association with a permit to organize a parade on St. Patrick's Day denied the request of an LGBT group to march in the parade "as a way to express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals." Like *Masterpiece Cakeshop*, the parade organizers "disclaim[ed] any intent to exclude homosexuals as such." *Id.* at 572. Their "disagreement" was over the "message conveyed" by the respondents' banner, with which the petitioners did not wish to be associated. *Id.* In an argument similar to that of the court below, the Massachusetts court concluded that the parade had no "specific expressive purpose" and that "any infringement on the Council's right to expressive association was only 'incidental' and 'no greater than

necessary to accomplish the statute's legitimate purpose' of eradicating discrimination." *Id.* at 563-64. But in an opinion by Justice David Souter, this Court unanimously reversed. Quoting *Barnette*, the Court declared that "[s]ymbolism is a primitive but effective way of communicating ideas," and accordingly accepted that the parade served an expressive function. *Id.* at 568-69. And while emphasizing the legitimacy and importance of state public accommodation laws in most contexts, the Court recognized that when applied to an expressive activity like a parade, "the state courts' application of the statute had the effect of declaring the sponsors' speech itself to be the public accommodation[,]" violating the "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id.* at 572-73.

Here too, the Colorado courts have made Phillips' creative expression the public accommodation. The message of *Hurley* is that public accommodation laws cannot constitutionally be applied to persons engaged in expressive activities so as to force them to convey messages they do not wish to convey.

More generally, litigation growing out of a merchant's or vendor's reservations regarding same-sex marriage may, in some instances, be primarily calculated to regulate messages—to censor and compel *expression*. Indeed, contemporary advocates are forthright in explaining that the primary purpose of such litigation is to redress the "dignitary harm" suffered when same-sex couples are in essence told

that an objecting baker, florist, photographer, or other provider regards their union as morally wrong or contrary to God's law.[9] The offense or "dignitary harm" in such situations may be real enough. (By the same token, Colorado surely could be described as inflicting a severe "dignitary harm" on Phillips by officially disapproving of his fundamental convictions regarding marriage and then graphically and forcibly communicating that disapproval by in effect conscripting him to use his creative talents to celebrate the very thing that his convictions disapprove.) But however real the injury may be (on both sides), the gravamen of litigation demanding redress for "dignitary harm" is that plaintiffs are offended by the tacit or open communication of another citizen's constitutionally protected beliefs regarding marriage. And the purpose of such lawsuits is effectively to censor or punish the objecting merchant for that communication, and to compel the merchant to withdraw his or her objection and to celebrate the marriage- –"by word or act"—in direct contravention of his or her beliefs.

To put the point differently: the "dignitary" injury alleged in this and similar cases is not essentially different than it would be if a traditional Christian simply said to a same-sex couple: "In my opinion, your union is contrary to God's law, and is not a marriage in God's eyes." Such a statement might well produce

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[9] *See*, e.g., Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2566-78 (2015); Louise Melling, *Religious Refusals to Public Accommodation: Four Reasons to Say No*, 38 Harv. J. L. & Gender 177, 189-91 (2015).

offense, or "dignitary harm." But if a same-sex couple were to sue for damages based on such a statement, or for an injunction compelling the speaker to recant and to affirm their marriage, the suit would surely be peremptorily dismissed on free speech grounds. Similarly, if a state were to pass a law prohibiting the expression of such views, the law would surely be struck down. The revered principles of the First Amendment should not be able to be shunted aside, however, merely by invoking the language of "dignitary injury" and "discrimination."

Respondents' censorial purpose is pellucidly clear in the present case, whether we consider the case from the respondents' or the petitioners' point of view. Thus, as the Court of Appeals explained, respondents Craig and Mullins approached Phillips and asked him to "design and create a cake to celebrate their same-sex wedding." 370 P.3d at 276. It was that creative and expressive task that Phillips could not in good conscience perform, and that respondents would compel him to do—namely, to use his talents, upon request, to create cakes celebrating same-sex marriage. Indeed, there is nothing else that the State and other respondents even ask for. There were no pecuniary or material damages—respondents Craig and Mullins easily obtained a wedding cake featuring a rainbow design from another bakery, App. 289-291a—and no damages were awarded. The remedy granted by the court consists solely of a series of measures calculated to ensure that Phillips will provide cakes celebrating same-sex weddings in the future, and will train his staff accordingly.

In other similar cases, to be sure, courts have sometimes awarded *de minimis* damages for the costs of obtaining the product or service from another vendor. For example, in *Washington v. Arlene's Flowers, Inc.* 389 P.3d 543 (Wash. 2017), *petition for cert. filed*, (U.S. July 14, 2017) (No. 17-108), currently pending before this Court, plaintiffs claimed and the court awarded $7.91 in damages for the cost of driving to another florist. But *that* is plainly not the injury for which plaintiffs in these cases incur the tremendous expense and burden of litigation. They sue, rather, for the "dignitary injury" or offense communicated by a merchant's disapproval of their union (as, once again, advocates candidly acknowledge). And, once again, a claim based on such "dignitary injury" amounts to the complaint that respondents are offended by the communication of a belief that petitioner has a constitutional right to hold and express.

To be sure, the judiciary *could* attempt to separate out the discrimination claims while respecting the constitutional freedom of expression by adopting a rule allowing plaintiffs in such cases to recover for injuries *other than* those that amount to offense caused by the expression of constitutionally protected beliefs. Those other damages would amount to $7.91 in *Arlene's Flowers*, it seems, and to nothing (except perhaps nominal damages) in the present case. How many of these lawsuits would be brought under such a rule? The answer to that question underscores what the essential purpose of these lawsuits is.

In short, respondents' central if not sole purpose in this lawsuit is censorial in character: it is concerned not with the denial of a needed product or service, but rather with an unwanted message. For his part, similarly, Phillips objects to providing the cake solely because of the message it would convey, which would contradict his Christian beliefs. He manifestly does not object to serving homosexuals; on the contrary, as the Court of Appeals explained, Phillips told Craig and Mullins that although "he does not create wedding cakes for same-sex weddings because of his religious beliefs, . . . he would be happy to make and sell them any other baked goods." 370 P.3d at 276. The sincerity of this profession is undisputed, and is corroborated by the fact that Phillips has declined to bake cakes with other messages he deems objectionable, including racist, atheistic, anti-American, or anti-family themes. App. 283-284a, pps. 61, 63-64.

In sum, whether considered from respondents' perspective or from Phillips's perspective, this case is predominantly or even *solely* about expression—about a celebratory message that respondents would compel Phillips to create but that he cannot make in good conscience. In that respect, the case falls squarely within the scope of the principle articulated in *Barnette*.

C. If Accepted, the Court of Appeals' Rationalizations Would Effectively Eviscerate the Constitutional Prohibition on Compelled Affirmations.

It is undisputed that petitioners Craig and Mullins asked Phillips to "design and create a cake to celebrate their same-sex wedding," and that Phillips declined to do this because, as the Court of Appeals explained, he "believes that decorating cakes is a form of art, that he can honor God through his artistic talents, and that he would displease God by creating cakes for same-sex marriages." 370 P.3d at 277. In addition, the court recognized that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage and, in such cases, First Amendment speech protections may be implicated." *Id.* at 288. Nonetheless, the court attempted to minimize or mitigate Phillips's expressive concerns. But the court's attempts at mitigation, if accepted, would have the effect of negating altogether the venerable commitment described in *Barnette* as the "fixed star in our constitutional constellation."

Thus, the Court of Appeals assumed that a "reasonable observer" would understand that Phillips was under legal compulsion. If Phillips were to design and create the cake as requested, therefore, this hypothetical observer would perceive Phillips not as endorsing same-sex marriage but simply as complying with the law. Or so the Court of Appeals surmised. 370 P.3d at 286. That rationalization, however, would effectively eviscerate the principle against compelled affirmations (except perhaps in the

exceedingly rare case in which observers are unaware that legal compulsion is being exerted).

Thus, to the Jehovah's Witness schoolchildren in *Barnette*—or, for that matter, to the dissenting Virginia Baptists who objected to paying a tax to support the propagation of more mainstream Christian teachings, or to Sir Thomas More struggling to avoid affirming the validity of Henry's annulment, or to the Jews and Muslims and "heretics" subjected to the Spanish Inquisition, or to the Christians punished and sometimes executed for refusing to pay religious obeisance to the Roman gods, or to the Jews who were punished for refusing to bow to Nebuchadnezzar's golden statute—the proponents of the prevailing orthodoxy could always insist: "You're making a big deal out of nothing. Nobody will assume that you actually believe what you're outwardly seeming to affirm; they'll know you're just doing what the law compels you to do."

In reality, the expressive injury in Phillips's case is in one sense more invasive than in many other such instances; that is because Phillips has been enjoined not merely to subsidize or even formally assent to some set or established creed, but rather to engage his own artistic talents in crafting a message contrary to his convictions. Thus, Craig and Mullins did not come to him with a preformulated cake design and ask him to execute that design; on the contrary, they requested that Phillips himself "*design and create* a cake to celebrate their same-sex wedding." 370 P.3d at 276 (emphasis added). Having affirmatively devoted his artistic talents to the creation of this celebratory message, Phillips would find it all the

more difficult to be perceived as merely passively complying with the law.

The Court of Appeals also argued that if Phillips was concerned about perceptions that he was endorsing same-sex marriage, he could simply put up a sign in his window or a post on the Internet declaring his belief that same-sex marriage is contrary to Biblical teachings. 370 P.3d at 288. Once again, the same rationalization might have been offered to the schoolchildren in *Barnette*: "Just salute the flag and recite the Pledge—everybody will know that you were forced to do it, and that you don't really mean it—and then explain to your friends and classmates what your real beliefs are."[10]

But this possibility does nothing to negate the constitutional offense of compelled affirmations. The right in question is a right *not* to speak. The crucial importance of that right—the right to keep silence with respect to an issue—is apparent in many situations involving government-imposed orthodoxies, and it is starkly manifest this case. After all, a citizen who does not want to celebrate a same-sex marriage contrary to his or her convictions may at the same time have no desire affirmatively and publicly to proclaim to all the world that same-sex marriage is sinful. And such a public proclamation (which of course would likely cause widespread offense and, ironically, would aggravate exponentially

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[10] Cf. *Pacific Gas*, 475 U.S. at 16, "Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."

the civil division and dignitary harm that the court's ruling is ostensibly attempting to redress) is hardly a cure for the injury of being compelled to affirm what one does not believe.

The Court of Appeals also asserted that because Phillips *sells* cakes, he would be perceived not as endorsing the messages conveyed by his cakes but instead merely as complying with a customer's requests: the message would be attributed entirely to the customer, not the baker. 370 P.3d at 287. That assertion is difficult to square with the court's simultaneous approval of other bakers who refused requests for cakes with messages opposing homosexual conduct on the ground that in those instances the refusal was justified "because of the offensive nature of the requested message." 370 P.3d at 282 n. 8. But more generally, the court's assertion is utterly implausible on the facts of this case.

Thus, Craig and Mullins did not merely ask to buy an already made cake off the shelf or from the display case. Nor did they come to Phillips with an already made design or diagram and ask him to make a cake to their specifications. Instead, they asked Phillips himself to "design and create a cake celebrating their same-sex wedding." The design and creativity—done for the express purpose of "*celebrat[ing]* their same-sex wedding"—was to be *his*, not theirs. Moreover, Phillips had refused to make other cakes with morally or religiously objectionable messages. A "reasonable observer" acquainted with these facts would naturally and plausibly infer that Phillips has no similar objection to same-sex marriage if he were to design and create a cake celebrating a same-sex wedding.

In sum, if the rationalizations offered by the Court of Appeals for minimizing the concern about expressive freedom were accepted, the consequence would be effectively to negate the cherished principle against compelled expression, or at least to make that principle a tool to be used in partisan or viewpoint-discriminatory fashion as the administrators of current orthodoxies see fit.

II. The State's Attempt to Compel Phillips to Celebrate and thereby Affirm Same-Sex Marriage is Not Justified by Any Compelling Interest Because Phillips Has Not Engaged in Invidious, Status-Based Discrimination.

Regulations in derogation of core First Amendment commitments can be justified, if at all, only by the most compelling of state interests. The elimination of historically-entrenched and invidious status-based discrimination might be considered by some to be such an interest. Thus, even if (contrary to historical fact) seminal measures prohibiting racial discrimination like the Civil Rights Act of 1964 had been primarily directed at dignity-denying *messages* of racial exclusion or inferiority, not at actual deprivations of goods, services, and opportunities, some might consider this to be a sufficiently compelling interest. But however one might evaluate that consideration, no similar interest is present in this case. That is because the facts make it unmistakably clear that Phillips did not engage in invidious or status-based discrimination.

Once again, Phillips clearly did not have any objection to selling to customers on the basis of their

sexual orientation. His objection, precisely stated, is not to designing and baking cakes for *weddings involving homosexual individuals*, but rather to designing and baking for the purpose of celebrating *same-sex weddings*. The distinction is a subtle one, to be sure—some lower courts have manifestly failed to grasp it—but it is nonetheless crucial.

Thus, Phillips would have no objection to baking a cake for a wedding between a man and a woman even though one or both of them might self-identify as gay or bisexual. Conversely, he could not in good conscience help to celebrate a same-sex wedding even if, as may occasionally happen, both partners happened to be heterosexual and were marrying for publicity or political reasons, or perhaps to gain tax advantages. Carefully considered, and in a strict sense, his objection to designing and baking a cake for Craig's and Mullins's wedding was not "because of" their sexual orientation.[11]

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[11] The "limited menu" analogy relied on by the Court of Appeals is thus inapt. Borrowing the analogy from *Elane Photography v. Willock*, 309 P.3d 53 (N.M. 2013), the Court of Appeals reasoned that a restaurant that served its full menu to men but not to women would discriminate even if the restaurant were willing to serve appetizers to women. 370 P.3d at 282. That proposition is surely correct. Phillips' position, however, is *not* that he will sell anything on his inventory to "straight" customers and anything except wedding cakes to LGBT customers. His position, rather, is that everything on his inventory or "menu" is available to any customer without regard to sexual orientation; but a cake designed to celebrate a same-sex wedding is simply not on his "menu"—*for anyone* again regardless of their sexual orientation.

The Court of Appeals, of course, did not construe Colorado's antidiscrimination law in this strict sense. As it was free to do, the court interpreted the statutory term "because of" more loosely and expansively to cover Phillips's conduct. That was not a surprising interpretation: as the court explained (and as common sense would dictate), same-sex marriage is "predominantly, and almost exclusively, engaged in by gays, lesbians, and bisexuals," 370 P.3d at 283; consequently, a merchant's unwillingness to create cakes for same-sex weddings will predominantly affect a class based on sexual orientation. In effect, the court interpreted Colorado's antidiscrimination law as a "disparate impact" measure: regardless of how a merchant defines his policy, and whatever his purposes or motivations might be, if the impact of the merchant's policy falls predictably and primarily on a protected class, then the statute applies.

The Court of Appeals was free to interpret state law in this expansive sense.[12] And in our federalist system, this Court normally will not and should not second-guess a state court's interpretation of its own law; nor are petitioners asking the Court to do that. Even so, the fact remains—and indeed remains

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[12] The court's interpretation was premised, however, on the mistaken assumption that in *Obergefell v. Hodges*, 135 S. Ct 2584 (2015), this Court treated "opposition to same-sex marriage" as "tantamount to discrimination on the basis of sexual orientation." 370 P.3d n. 8. In fact, this Court declared that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here." 135 S. Ct. at 2602.

incontrovertibly clear—that Phillips does not believe in or practice the sort of invidious discrimination in which a merchant objects to serving some people just because and on the ground that they are black, or female, . . . or gay.

Indeed, the Court of Appeals effectively admitted as much. Distinguishing this Court's decision in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 267-68 (1993), in which the Court ruled that a clinic's refusal to perform abortions was not equivalent to discrimination against women (even though, obviously, the immediate impact of that policy would fall exclusively on women), the Court of Appeals explained that *Bray* had been decided under 42 U.S.C. sec. 1985(3), which requires plaintiffs to show "invidiously discriminatory animus." The Colorado antidiscrimination law, by contrast, does not require any similar showing. 370 P.3d at 281-82. The court thus interpreted state law to extend even to cases, like this one, where no "invidiously discriminatory animus" is present.

Once again, within constitutional limits a state court is free to interpret its own law as it sees fit. Even so, the Court of Appeals' interpretation is relevant to the strength of the State's interest in supporting the curtailment of the core First Amendment right against compelled expression. Some might suppose that antidiscrimination laws aimed at combating the evil of invidious status-based discrimination—at merchants or employers who refuse to deal with or to employ particular people just because they are black, or female, or gay—advance an interest sufficiently compelling to justify such

curtailments. But even on that supposition, there is no justification for such an infringement in this case or under this statute (as the Court of Appeals construed it).

III. Exalting and Extending Nondiscrimination Policies at the Expense of Core First Amendment Commitments Would Undermine the American Constitutional Tradition and Would Exacerbate Cultural and Political Conflict.

Public policies that attempt to eliminate and provide remedies for discrimination interact with longstanding commitments to freedom of belief, expression, conscience, and religion. Both kinds of commitments are cherished and essential components of the American constitutional tradition. Antidiscrimination policies, as reflected in federal and state antidiscrimination laws, manifest evolving conceptions of equality traceable back to the lofty assertion in the Declaration of Independence that "all men are created equal." By the same token, the commitment to expressive and religious freedom resonates with what have often been deemed the "first freedoms," as collected in the First Amendment.

Both kinds of commitments are held dear by Americans—and have been for generations. If treated as categorical and expanded to its utmost possible scope, however, either kind of commitment *could* subordinate or displace the other; but given the vital importance of each, it is imperative that courts preserve and respect each through a sensitive and

prudent construction and application of laws reflecting each commitment.

Indeed, that imperative is all the more urgent at the present time given the nation's increasing polarization, noted by numerous observers and social scientists. Under such conditions, advocates of one policy will sometimes press an aggressive "scorched earth," "take no prisoners" agenda. Recently, for example, a leading progressive academic who, at least on this point, undoubtedly speaks for many, declared victory in the so-called culture wars. "*The culture wars are over; they lost, we won.*" And he urged a "hard line," no compromises approach to religious traditionalists (like Phillips): "You lost; live with it."[13] A similar attitude is discernible in other advocates and advocacy groups, as well as in some lower court decisions.

Tempting as such a position might be, though, and exhilarating as it might be simply to crush one's opposition while the political and cultural momentum happens to be on one's side, this course exalts one important public commitment at the expense of other equally important commitments. Moreover, at a time when national unity seems desperately needed, a course of uncompromising zeal will predictably exacerbate rather than assuage cultural conflicts. The judicial role, surely, is not to act as champion for one or another faction, but rather to respect and reconcile the vital, longstanding policies and

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[13] *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKIN.COM (May 6, 2016), https://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html.

commitments expressed in various laws that sometimes come into tension.

Not every scholar or judge or citizen will arrive at the same balance or reconciliation, of course. The signatories to this brief are far from agreeing in all particulars about the proper resolution of competing commitments to equality and to expressive freedom. Thus, in a case in which a person or business simply asserted a personal, moral, or religious objection to serving gays or lesbians (if such a case were to arise), some might conclude that the antidiscrimination policy should always and automatically prevail; others might incline to a less categorical, more contextual approach.

But however this Court might resolve that conflict if and when it ever arises, the crucial fact is that *the issue is not presented in this case.* Once again, Jack Phillips is emphatically *not* the much-feared (and possibly hypothetical) merchant who declines on personal, moral, or religious grounds to serve gays and lesbians. On the contrary: Phillips's Christian faith permits and indeed demands that he serve all people, regardless of sexual orientation; it merely forbids him to use his artistic gifts to provide one particular service (regardless of who might request it) the purpose of which is to celebrate and thereby affirm something he believes to be contrary to God's law and biblical teachings.

To ignore or flatten such crucial distinctions, as some lower courts have done, and as the Court of Appeals did in this case, is to exalt and extend one important policy in disregard of the longstanding

commitment to freedom of belief, expression, and religion. It is in effect to adopt the agenda of advocates who would simply bulldoze or crush the opposition in a cultural struggle: "You lost; live with it." Such a course is neither prudent, nor inclusive, nor faithful to our rich and pluralistic constitutional traditions. Conversely, in tense times, for this Court to recognize and affirm the crucial distinction between an objection to *same-sex marriage* and the much more offensive (and rare) objection to *serving people who are gay or lesbian* would be an important step toward a sensible reconciliation of laws and policies promoting both antidiscrimination and expressive freedom.

Indeed, this Court explicitly pointed to such a reconciling position even as it recognized a constitutional right to same-sex marriage. Thus, in *Obergefell*, this Court counseled that "[m]any who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here," 135 S. Ct. at 2602. The Court's statement reflected a laudable effort to promote tolerance and mutual respect in a pluralistic national community. It would be hollow and hypocritical reassurance, though, to tell citizens like Jack Phillips that they are not being "disparaged" and that their premises are "decent and honorable"—but that they will nonetheless be subjected to crippling legal sanctions and ongoing judicial supervision merely because of the offense or "dignitary harm" they ostensibly cause if they act in accordance with their "decent and honorable" premises in their family businesses.

Conversely, the cause of reconciliation would be furthered by judicial recognition that although no one has a constitutional right to engage in invidious status-based discrimination, the nation's central and historic commitment against compelled expression will continue to be honored when a business person's only objection is to providing particular expressive products or services that convey a message of affirmation contrary to the person's deeply-held beliefs.

CONCLUSION

It is undisputed that Jack Phillips has no objection to serving gays and lesbians; his only objection is to using his artistry to create and express a message celebrating and affirming an understanding of marriage that he believes to be contrary to God's law. In this lawsuit, respondents seek to compel Phillips to make that expression. This purpose directly contradicts the cherished constitutional principle, eloquently articulated in *Barnette*, that the government may not establish an orthodoxy and compel citizens to affirm that orthodoxy "by word or act." The present appeal provides this Court with an opportunity to reaffirm that historic principle and to strike a more measured and inclusive balance between the community's vital commitments both to equality and to expressive freedom.

Respectfully submitted,

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September 7, 2017

APPENDIX

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Appendix 1a

APPENDIX[1]

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